

JAN 29 2007**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS****Nos. 06-30124/06-30133, *United States v. Arcand* and *United States v. Wing***

CLIFTON, Circuit Judge, concurring:

I write separately to express my dismay at the consequences of the result we reach. Although I concur in the memorandum disposition and join fully in its legal analysis, I find the outcome of this case to be troubling.

Even the Government appears to accept that the terrible death of the victim here was an unintended consequence of the defendants' act of burning down a house they viewed as theirs, in order to end a long-running family disagreement. It has not been disputed that the defendants acted without knowledge that the victim, previously seen getting into a car, had returned to the house and fallen asleep in a bedroom. Nothing reflects any intent on the part of the defendants to injure the victim or anyone else. Aside from this one episode, the defendants have had only a few minor brushes with the law. Yet the mandatory sentences of life imprisonment mean that the lives of these young people, aged 25 and 21 at the time of conviction, may be entirely squandered in prison. It is appropriate that the defendants be seriously punished for what they did, but these life sentences do not square with my concept of justice.

I do not suggest that a mandatory sentence of life imprisonment for felony murder is fundamentally unjust. Rather, I am struck by the consequences of how prosecutorial discretion was exercised in this case. It is telling to me that the Government has made no effort to defend these life sentences based on the particular facts here. I acknowledge that I may not have a complete picture, because it has not been necessary for us to investigate the details of all that occurred that night. I agree with the Government that serious punishment is properly in order. Arson is a serious crime. Anyone setting a fire, even if acting legally, should be responsible for making sure that it is done safely and that nobody will be hurt, which the defendants failed to do. But the Government has not argued or even indicated a belief that the appropriate punishment on the facts of this case is life imprisonment. Why did the Government pursue first-degree murder charges, if it cannot justify the resulting mandatory punishment based on the specific acts of these individuals? What happened here seems much more like what most people would understand as negligent homicide; I suspect few, if any, would consider this “first-degree murder.”

Rather than justify the life sentences for these defendants, the suggestion was made at oral argument that felony murder was charged here so that the defendants might be persuaded to accept a deal that involved pleading guilty to a

lesser charge. Despite my appreciation for the candor displayed by the Government, this explanation provides no comfort. Whatever might be said about using charging decisions as part of hardball negotiation, there is nothing to commend carrying this strategy through to conviction, at least in this case. The Government brought these charges; it cannot pretend to be an innocent bystander without responsibility for what happened thereafter.

Extreme justice is extreme injustice, according to an ancient legal maxim cited by Cicero. *Bartlett's Familiar Quotations* 108b n.7, 151b (Emily Morison Beck ed., 14th ed. 1968) (“*summum ius summa iniuria*”). So it may be here. This court cannot properly alter the result of what was set in motion by this prosecution, but that does not have to be the end of the story. The President has the power to temper justice with mercy. I hope that the Executive Branch revisits this case and, if the facts truly are as they have been made to appear to us, will consider letting the defendants go after a more appropriate term of incarceration.